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IN ARBITRATION PROCEEDINGS

PURSUANT TO AGREEMENT BETWEEN THE PARTIES

IN THE MATTER OF A CONTROVERSY **BETWEEN:** **SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 715, UNION,** **and** **HOUSING AUTHORITY OF THE COUNTY OF SANTA CLARA, EMPLOYER,** **Involving the Grievance of Valerie Romero** **Case No. CSMCS NO. ARB 03-1769**	**ARBITRATOR'S OPINION AND DECISION**

This Arbitration arises pursuant to Agreement between Local 715, Service Employees International Union, hereinafter referred to as the "Union," and Housing Authority of the County of Santa Clara, hereinafter referred to as the "Employer," under which Dennis L. Isenburg was selected to serve as sole, impartial Arbitrator, whose decision shall be advisory to the parties.

Hearing was held on April 15, 2004 in San Jose, California. The parties were afforded full opportunity for the examination and cross-examination of witnesses, the introduction of relevant exhibits, and for closing argument. The Union argued orally at

the conclusion of the hearing, outside the presence of the Employer representatives. The Employer submitted a brief, received on May 14, 2004. The matter is submitted.

APPEARANCES:

On behalf of the Union:
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A. ISSUE

Whether or not there was cause for the termination of Grievant Valerie Romero pursuant to Article 20 of the Memorandum of Understanding, and if good cause is not found, what shall be the remedy?

B. RELEVANT PROVISIONS OF THE AGREEMENT

ARTICLE 7 - GRIEVANCES

7.1 Definition of Grievance

A grievance is a dispute between the Employer and an employee (or the Union) about the application or interpretation of this MOU, except as specifically excluded in this MOU. The grievance procedure set forth below shall govern all such disputes.

7.2

Procedural Steps

The following procedures shall occur and govern all grievances:

A. First Level - Informal Conference

The employee shall request an Informal Conference with his/her Immediate Supervisor to attempt to resolve the grievance. This request may be made either orally or in writing to the immediate supervisor within ten (10) working days after the occurrence of the event(s) on which the grievance is based, or within ten (10) working days after the employee's first knowledge of those events.

The Informal Conference shall be held within five (5) working days of the date the employee requested the conference. A Union representative shall be present if requested by the employee. Following the Informal Conference, the immediate supervisor shall respond to the employee in writing and mail or hand-deliver the response within five (5) working days from the date of the Informal Conference.

Any grievance involving discharge, suspension, demotion, or pay-cut will automatically be filed at the second level.

B. Second Level -Formal Procedure

If the grievance is not resolved at the Informal Conference, the employee may initiate a formal grievance. All formal grievances are grievances by individual employees.

Each formal grievance must be signed by the individual employee. If more than one employee files a grievance based on the same occurrence, the Director, at his/her discretion, may combine grievances for purposes of his/her statement of decision.

Step 1 -Submitting the Formal Grievance

All formal grievances must be submitted to the Department Director within ten (10) working days from the date of issuance of the supervisor's written response to the Informal Conference. If the Department Director is the employee's immediate supervisor, the Executive Director shall appoint a Designee to handle the grievance in lieu of the Department Director. The parties shall meet within ten (10) working days of the submission of the formal written grievance. A Union Representative may be present if requested by an employee. The employee must provide a copy of the formal grievance to his/her immediate supervisor. All formal grievances shall be in writing on a form mutually agreed upon by both parties.

Step 2 -Responding to the Formal Grievance

The Department Director or the Designee appointed in Step 1 shall respond to the grievance in writing stating the decision made, within ten (10) working days of the Step I meeting, and provide a copy of the response to the employee's immediate supervisor, and to the employee or the employee's Union Representative if the employee was represented.

C. Third Level -Appeal Procedure

If the employee is not satisfied with the decision, s/he may appeal the decision, in writing, to the Executive Director within ten (10) working days of the date on the correspondence of the Step 2 decision. The employee may not add to or change the content of the formal grievance as submitted in Step 2.

The Executive Director, or a Designee different from the one appointed at Step 1, shall render a written decision to the employee, concerning each issue grieved, within ten (10) working days of the receipt of the appeal. Copies of the decision shall be provided to the employee and to the person who handled the grievance at Step 2. The decision of the Executive Director/Designee will be final.

7.3 Time Limitations

Employees and supervisors shall be bound by the procedural time limits set forth below. Failure of the employee/grievant or the Union representative to act within the time limits shall constitute abandonment of his/her grievance. Failure of a supervisor to act within the time limits shall move the grievance to the next higher decision level. The time limits established in this procedure may be extended or waived for extenuating circumstances by mutual agreement.

ARTICLE 20 -DISCIPLINARY ACTIONS

20.1 For Cause

Except for probationary employees (see Article 1.2A), bargaining unit members may be disciplined for cause only. Disciplinary action by the Employer may consist of verbal counseling (documented), written warning, suspension, demotion or termination. The Employer may impose any, all, some, or none of the foregoing disciplinary actions prior to termination of employment.

20.2 Notice and Process

Each disciplinary action other than verbal counseling and written warning shall be preceding by a written Notice of Disciplinary Action given to the employee prior to the effective date of the discipline. The employee shall have the opportunity to respond in writing through the grievance procedure, whereupon a hearing will be

granted with the Executive Director's Designee. Should the Designee sustain the recommendation, the employee may proceed to the Second Level in the grievance process (see Article 7).

20.3 Grievability

The employee and/or the Union may grieve any suspension, demotion or dismissal. The Employer shall bear the burden of proof that discipline was for cause.

20.4 Personnel Files

An employee's personnel file shall not contain materials about any disciplinary action recommended but not taken or disciplinary action overturned by the grievance procedure. No disciplinary action will be taken against employees based solely on actions occurring more than two years ago or more than two years from the time the Employer first learns of the employee's conduct.

Employees are entitled to one free copy of anything the employee signs that is placed in the personnel file. The employee will be charged for the cost of additional copies. Employees are entitled to review their personnel files by appointment in the presence of an employee from Employee Services as set forth in Article 4, Section 7 of this Memorandum of Understanding.

By "Tentative Agreement" dated December 6, 2002 (signed by representatives of the parties) and an Employer "Proposal" dated January 15, 2003 (signed by an Employer representative), the parties agreed to the following language:

> New step added to grievance procedure provides advisory arbitration. Union may appeal Step 3 determination to a neutral third party for a determination. In the event the Union prevails in arbitration of a grievance, the Employer has a limited time period to exercise an option to overturn the award. In such event the Union may appeal to court. Otherwise, the award will stand.[1]

C. FACTS

Grievant was hired on February 14, 1998 and was employed full-time until her termination on July 10, 2003. She began her employment as a receptionist, and was promoted to Housing Program Specialist in September 2001.

[1] JX 4, item 6

As a housing program specialist, Grievant conducted annual inspections of subsidized and low-income housing units. Employees in this position are out of the office regularly, following a schedule of appointments to inspect units under the jurisdiction of the Housing Authority. Of course, this involves regular contact with owners and with tenants, as well as travel from site to site, during the workday. Housing Program Specialists do have "in" days when they are in the office to follow-up on the paperwork required, return phone calls, and other work. From the evidence introduced (the testimony of witnesses and ER 6, the job description), it appears that specialists are required to be out of the office the majority of their work time.

On September 21, 2001, Grievant met with Rita Tabaldo and Patricia Gonzales, two members of supervision, in "…an informational counseling session" to discuss Grievant's absences from December 2000 through August 2001.[2] Gonzales testified that during this session Grievant acknowledged a need to improve her attendance.

According to Gonzales, Grievant's attendance did not improve. Grievant's attendance pattern caused problems in the department, including complaints from tenants and owners and other staff. On days when Grievant was absent, other staff had to be assigned to do the inspections scheduled for Grievant, causing their own workload

[2] ER 1 is a memo confirming this discussion. The memo refers to an attendance summary that was not included with the exhibit.

to suffer. On December 21, 2001 another disciplinary session occurred.[3] The disciplinary memo issued at this session concludes:

> "Immediate improvement must be shown and maintained or further disciplinary action will be taken, which may include termination of employment. The Housing Authority has a progressive discipline policy."

On January 23, 2002, another disciplinary meeting was conducted, and the memo issued as a result of this meeting is labeled "Written Warning Regarding Absenteeism."[4] This memo states that Grievant had called in sick on January 14, 2002. It also comments that Grievant had been approved for a vacation day on December 24, 2001 and 4.5 hours vacation time for January 7, 2002. The memo also contains the warning, "Be aware that excessive absenteeism will not be tolerated, and failure to improve immediately can lead to further disciplinary action, which may include termination of employment." An attachment to the memo is labeled "Employee Counseling Notice" and includes a comment handwritten by Grievant, "I realize that my Attendance has been a major factor and I intend to make a huge difference in this matter."

Gonzales testified that Grievant's attendance and performance did improve after this warning. In June, Gonzales took another position and was replaced by Rita Tabaldo. Gonzales prepared a memo to Tabaldo concerning each of the employees to

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[3] ER 2 is a memorandum to Grievant from Gonzales, issuing a verbal warning for absenteeism and placing Grievant on a Performance Improvement Plan. This memo also discusses other performance issues.

[4] ER 3

be supervised by Tabaldo, including Grievant. Concerning Grievant, Gonzales' memo stated:

> "Valerie was placed on a performance improvement plan from January 23, 2002 through April 23, 2002. She was successful in demonstrating substantial improvement with regards to her performance and attendance."[5]

The memo also mentioned several areas of improvement necessary for Grievant, and recommended that Grievant's performance be monitored until December 2002. Grievant's performance had improved enough to allow her to receive her annual increase effective April 24, 2002.[6] The increase had been delayed because Grievant was on a Performance Improvement Plan.

In July 2002 Grievant received a verbal warning for excessive mileage.[7]

Tabaldo testified that during the months of June to August 2002, after she became Grievant's supervisor, she observed a reoccurrence of Grievant's attendance problem. She further testified that she was working with the Personnel Department during this time to prepare another disciplinary action concerning Grievant. Due to Grievant's August car accident and her leave to recuperate after that accident, the discipline was not discussed with Grievant until a meeting on January 29, 2003, followed by a memorandum dated February 6, 2003. This discipline was a Final Written Warning for Continued Absenteeism, and contains the following language:

> Failure to improve immediately and maintain improvement will result in termination of your employment with the Housing Authority of the County of Santa Clara. [8]

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[5] ER 4

[6] UN 2

[7] ER 6. This disciplinary action does not refer to absenteeism or tardiness.

The discipline also contains an Attendance Summary for the period 6/01/02 to 8/31/02. The summary reflects that during that period, Grievant was recorded as off work for illness-related reasons a total of 59.25 hours, with approximately 22 hours paid as sick leave, 29 hours recorded as vacation in lieu of sick leave, and 8 hours "Pay Dock," presumably meaning no sick leave or vacation was available. It also reflects 34.75 hours off work related to Grievant's car accident.

In May 2003, Tabaldo delivered to Grievant her Annual Performance Evaluation, for the period March 2002 to April 2003.[9] The Evaluation rated Grievant as "Meets Standards" on most Factors rated, and notes that an area to improve is attendance.

On July 3, 2003, Tabaldo signed a "Notice of Intent to Terminate Employment."[10] Concerning her decision to recommend termination, she testified:

> MS. KLOSTER: Q. You eventually recommended Ms. Romero's termination?
> A. Yes.
> . . .
> Q. Did you have higher expectations, after someone is given a final written warning, that their punctuality and attendance would change?
> A. Definitely. It is expected for the employee to establish and improve their attendance and make themselves be reliable with the agency, as well as their coworkers, to see the substantial improvement, which she failed to do [Transcript, pp 51-52]

Tabaldo further testified that the "Attendance Summary" for Grievant for the period 12/01/02 to 7/02/03[11] was the basis for her decision to recommend that Grievant be terminated. The Grievant was terminated effective July 10, 2003. She filed a

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[8] ER 7

[9] ER 9

[10] ER 8

[11] UN 6

grievance concerning this action, which was processed through the grievance procedure and appealed to arbitration.

Grievant, at this time, was a single mother with a 15-16 year old daughter. She had no family member or other close friend who could assist her with care for her daughter if she was sick, needed to be picked up at school, or other issues of that sort. Grievant testified that:

1. Her sick leave usage was for illness of herself or her daughter;
2. She brought in doctor's notes for absences even though none were requested by the Employer;
3. Prior to her car accident she was given a memo stating that she her ". performance and attendance has improved substantially" and that she would receive a merit increase;[12]
4. She had an on-the-job car accident on August 13, 2003;
5. She returned to work just before Christmas that year;
6. She was not completely recovered at the time she resumed work, and she had a phobia of excessive driving;
7. She discussed a lateral transfer to customer service representative with her supervisor but was told this could not happen;
8. When others called in sick or were on vacation, she took their scheduled inspections, and it was not unusual to have such a redistribution of the appointments;
9. She feels that since her absences were legitimate and her situation as a single mother was very real, she should have been allowed to keep her job;

[12] UN 3

10. At this point her daughter is older and can drive a car so that aspect of her situation has improved.

Grievant also testified that she received unemployment insurance for about six months after her termination; and that she has sent in resumes and called employers in an effort to obtain employment.

D. POSITION OF THE EMPLOYER

The Housing Authority's decision to terminate Grievant is supported by good cause. Arbitrators define this term based upon an assessment of the reasonableness and the fairness of the Employer's actions. Additionally, arbitrators utilize the seven recognized test for just cause, which include proper notice, a reasonable rule applied in an even-handed way, a fair investigation, substantial evidence of the basis for the discipline, and disciplinary action reasonably related to the employee's actions.

1) Grievant was put on Notice that her absenteeism and tardiness could result in termination.

2) The rules Grievant violated were reasonable and necessary.

3) The Employer fairly applied the rules to Grievant.

4) The Housing Authority had substantial evidence of Grievant's chronic absenteeism and tardiness to support its decision to terminate Grievant.

5) Grievant's continued absenteeism and tardiness provided the Housing Authority with sufficient cause to terminate Grievant.

E. POSITION OF THE UNION

The evidence has shown that overall Grievant was a good employee of the Housing Authority and there was no just cause to terminate her employment.

Grievant had advanced in her employment with the Employer, beginning as a receptionist and receiving a promotion to customer service representative and then a promotion to housing program specialist. She had received advancement in responsibility within housing program specialist, becoming a recheck inspector. She was not demoted from that responsibility, but did choose to return to annual inspections when she found that a recheck inspector had a great number of inspections to perform, all over the county.

Grievant received certificates of achievement, the last one in May 2003, which signify that her performance was at least satisfactory at the time she received them. Grievant also received merit increases in 2002 and 2003.

Grievant had received letters of warning for attendance issues, but no other progressive discipline. In May 2002 she was informed that her attendance was improving. The Employer concedes that for periods of time after she received a letter of warning her attendance did improve.

Grievant had a car accident in August 2002. After her medical leave due to that accident, she received her final warning. The Union submits that, after this final warning, Grievant's attendance was not so egregious and extreme as to warrant discipline, much less termination. Between December 23, 2002 and July 2, 2003, Grievant was only sick for seven full days, and then there were other shorter absences,

totaling only 9.11 days out sick. This does not constitute abuse. Grievant still had vacation time left in her vacation bank.

Also, some of Grievant's absences were due to her daughter being sick or at a doctor's appointment. The Union does not claim that single moms should be able to abuse sick leave or have attendance issues without discipline. The Union does argue that this is a factor, though, that should be considered in determining whether her attendance constitutes some kind of abuse.

It was not unusual for inspectors to call in sick, and when that happened, other inspectors take those inspections. Grievant took other's inspections when they were sick, and a co-worker testified that he did not think Grievant's attendance was placing an unfair burden on the other inspectors. Grievant never complained about taking other inspector's work when they were out sick, because she considered that a routine part of the job.

Grievant also provided doctor's notes, even though the Employer never asked her to provide them. The fact that Grievant's absences were legitimate is not challenged by the Employer in this case. The Union does not believe that the Steward's letter (ER 11) is probative of the question of cause. It was sent after the Employer's decision was made, and was an attempt to resolve the dispute.

The Union believes that a make-whole remedy is appropriate. Grievant testified about her efforts to mitigate her lost wages. The Union believes this evidence demonstrates that she made reasonable, diligent, efforts. The make whole remedy should be Grievant's lost wages less unemployment and reinstatement without loss of seniority.

F. OPINION

The Arbitrator's Authority Under The Specific Language Of This Agreement.

The parties' new provision providing for arbitration[13] is obviously sketchy and probably will be revised, since the final language is apparently still being negotiated. The language refers to this proceeding as "advisory" but also describes the arbitrator's decision as a "determination." There was no discussion of this language by the parties, thus no dispute concerning its interpretation.

The Arbitrator has prepared this decision in the same form and format as a final and binding award.

Burden of Proof and Definition of "Cause"

As recognized by the parties here, in a case of discipline the burden is upon the Employer to prove that cause exists for the termination of Grievant. This burden includes:

1. Proving the facts supporting the decision to discharge, and,
2. Demonstrating that discharge is an appropriate action in light of the facts proven.

Though the language of the Agreement between these parties does not use the term "just cause," most arbitrators interpret the term used in Article 20.1 as having the same meaning. As quoted in "How Arbitration Works" by Elkouri and Elkouri (Fifth Edition, at p.887), one arbitrator (McGoldrick) has written:

> [I]t is common to include the right to suspend and discharge for "just cause," "justifiable cause," "proper cause," or quite commonly simply for "cause." There is no significant difference between these various phrases. These exclude discharge for mere whim or caprice. They are, obviously, intended to include

[13] JX 4, item 6

> those things for which employees have traditionally been fired. They include the traditional causes of discharge in the particular trade or industry, the practices which develop in the day-to-day relations of management and labor and most recently they include the decision of courts and arbitrators."

This standard is well established and much-discussed, but as this Arbitrator believes, in application it is simply based upon an analysis of the facts, applicable documents and relevant agreements/laws/regulations in the individual case at hand. Basic common sense is always a valuable guide, and fundamental to the analysis is a simple focus: Under the circumstances of the individual case, given the needs of Employer, the Employee, and the Union as the representative of all employees in the unit, is it within the reasonable and rational expectation of the parties to this contact that an employer can discharge an employee for the reasons cited by the Employer in this case?

Here, for the reasons discussed below, it is the Arbitrator's opinion that the Employer has met this burden, and the termination of Grievant was for cause.

The Arbitrator's Approach to a Discharge for Absenteeism

There has been no evidence or argument suggesting that the Employer contests the claim that Grievant's illnesses have been genuine. Therefore, the Arbitrator is assuming that this case is one where the Grievant, who sincerely professes a desire to do her job and support her family, has a problem maintaining a record of attendance which is satisfactory to the Employer. While Arbitrators uniformly support the concept that an employer is justified in terminating an Employee who is not able to correct a pattern of excessive absence, it is impossible to state any "bright line" rule. As Elkouri states it:

The right to terminate employees for excessive absences, even where they are due to illness, is generally recognized by arbitrators. However, no simple rule exists for determining whether absences are in fact "excessive." In this regard, Arbitrator Edwin R. Teple explained:

> At some point the employer must be able to terminate the services of an employee who is unable to work more than part time, for whatever reason. Efficiency and the ability to compete can hardly be maintained if employees cannot be depended upon to report for work with reasonable regularity. . .

In another statement, Arbitrator Marlin M. Volz explained that:

> Illness, injury, or other incapacitation by forces beyond the control of the employee are mitigating circumstances, excuse reasonable periods of absence, and are important factors in determining whether absences are excessive. However, if an employee has demonstrated over a long period of time an inability due to chronic bad health or proneness to injury to maintain an acceptable attendance record, an employer is justified in terminating the relationship, particularly where it has sought through counseling and warnings to obtain an improvement in attendance.

Examination of the cases cited in this subtopic makes it readily apparent that there is no fixed or generally accepted rule as to when the "excessive" absence point is reached-the particular facts and circumstances of the given case often will be considered along with the number of absences, the amount of time involved, and the prospects as to future absences. Moreover, an arbitrator may require considerable tolerance on the part of management where the equities in favor of the employee are strong.
(Elkouri, pp. 796-797)

This Arbitrator subscribes to these sentiments, and therefore, the case of this Grievant is troubling.

Consideration Of Evidence Other Than Absenteeism and Tardiness.

It is clear that the Employer terminated Grievant for absenteeism,[14] citing no other reason for discharge.

[14] ER 8, ER 10

During the hearing, the Employer introduced evidence of other performance problems of Grievant.[15] While the Arbitrator admitted this evidence, it is not relevant to the issue of whether the Employer had cause to terminate the Grievant for the reasons stated in the Employer's decision to terminate. Also, Grievant had received a Performance evaluation only weeks before her termination.[16] This evaluation rated her as "Meets Standards" in all rated areas except for two, and the comments concerning those two give no indication that serious performance issues are ongoing. On this evidence, it is concluded that Grievant's performance issues other than attendance had been resolved to a level sufficient to sustain her employment.

Therefore, evidence and argument relating to issues other than Grievant's absenteeism and tardiness have not been considered in arriving at this decision.

The Evidence of Grievant's Absenteeism and Tardiness

As discussed above, the analysis of "cause" for the termination of Grievant must be based upon a showing of an unacceptable pattern of absence. Here, the evidence demonstrates that Grievant was counseled and warned for absenteeism on a number of occasions prior to the termination of her employment:

1. September 24, 2001 – Informational Counseling
2. December 21, 2001 – Verbal Warning
3. January 24, 2002 – Written Warning
4. February 6, 2003 – Final Written Warning

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[15] ER 6

[16] ER 9

5. July 3, 2003 – Notice of Intent to Terminate

The September 24, 2001[17] counseling refers to an attendance summary that was not submitted. Since this was only a counseling, and no issue concerning its propriety is raised, it is assumed that Grievant's attendance was not acceptable.

The December 21, 2001[18] Verbal Warning includes both absenteeism and other performance comments, some of which are impacted by absence (appointments missed, calls not returned, voicemail full, failure to follow guidelines when requesting time off). The number of absence and absence-related issues does support the Employer's ongoing concern with regard to Grievant's attendance.

The January 24, 2002[19] Written Warning is suspect to this Arbitrator. It is based upon one day of absence for illness and one and one-half days of pre-approved vacation. Also, it relates to a one-month period, including Christmas and New Year's, when a "pattern" of absence could hardly be suggested or established. If this were the sole discipline here, it would not be sustained. However, it also contains Grievant's written acknowledgement that she needs to improve her attendance generally and her commitment to make such improvements, and thus makes clear her awareness of the importance of this matter.

During the period from January to June 2002 Grievant apparently made good strides in improving her attendance, and was commended for this effort in Gonzales'

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[17] ER 1

[18] ER 2

[19] ER 3

June 27, 2002 memorandum.[20] However, there was no attendance summary submitted to compare Grievant's attendance during this period to prior and subsequent periods.

The Attendance Summary contained in the February 6, 2003 Final Warning,[21] described above (pp. 8-9), also supports a continuing concern with Grievant's repeated pattern of absences. The Employer argues that there have been periods of time when Grievant's absences would lessen, but then the pattern would resume. This summary supports that argument, especially since during a portion of this period Grievant apparently had no sick leave, and her absences were without pay or charged against her vacation. The only aspect of this summary which troubles the Arbitrator is the reference to Grievant's absences from August 14 to August 20, 2002. Grievant was in a car accident on August 13 while at work, and just as the Employer does not cite her absence during the remainder of the year as a basis for her termination, the Arbitrator has ignored these absences. Even without considering these absences though, the number of absences and the amount of time off work, during a period of just over two months, justifies both the Employer's concern and its decision to issue the Final Written Warning.

Grievant's absence pattern during the period from her Final Written Warning to her termination on July 3, 2003 is contained on Union 6. A pattern of absence continues, including a couple of periods where her absences "bunch up" (4/18 to 4/28, 6/27 to 7/3). The pattern of absences does appear to be less than previous periods.

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[20] ER 4

[21] ER 7

However, the Arbitrator concludes that it was appropriate and justifiable that the Employer remain concerned about Grievant's absenteeism.

The Reasonableness of the Employer's Decision to Terminate Grievant

The fundamental question remaining here is whether the Employer, in July 2003, acted reasonably in deciding to terminate Grievant.

The Arbitrator does not place any weight on the "admission" of Grievant or the concession indicated by the Union Steward's letter.[22] Both are understandable efforts to resolve the matter, and do not, as far as this Arbitrator is concerned, amount to acceptance of the Employer's decision.

Also, as stated earlier, the Arbitrator considers this a case where the absence pattern of Grievant is without fault. The Arbitrator finds that Grievant, or her daughter, was legitimately ill on the occasions when Grievant was absent. This case turns solely on the determination that, even when absences are for understandable reasons, an Employer can, at some point, take action on the basis that the pattern is unacceptable. Then, after appropriate progressive discipline, the Employer can justifiably terminate an employee.

Grievant argues legitimate points:

- Her absences did not amount to "abuse;" which connotates inappropriate acts by the Grievant. There is no fault in getting sick.
- Some of her absences were due to her daughter's illnesses and she had no one she could ask for assistance. This is very unfortunate, but in light of her

[22] ER 11

awareness that her absences were creating great concern on the part of her Employer, it is a situation she should have sought to correct in some fashion. Grievant apparently did not do this.

- She was a committed employee. There is no dispute about this fact.

The Arbitrator agrees with these points, and does not endorse the language used by the Employer that suggests otherwise. As Elkouri points out, if the equities in favor of the employee are strong, more tolerance on the part of the Employer may be required. While agreeing with this premise, the Arbitrator finds that the Employer demonstrated sufficient tolerance in this case.

Finally, the Arbitrator agrees with those other Arbitrators who will not disturb a disciplinary decision of management if it is within the "zone of reasonableness" given the circumstances. Another way of saying this is that the Arbitrator will not, however tempting, decide a case based upon what he would do as opposed to what the Employer did do. The Employer's decision is within that "zone of reasonableness" in this case, and will not be disturbed.

G. AWARD

The Employer did not violate Article 20 of the parties' agreement when it decided to terminate the Grievant.

The grievance is denied.

DATED: July 23, 2004

Dennis L. Isenburg, Arbitrator